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No. 84-.....

In The

Supreme Court of the United States

October Term, 1984

RONALD KENT MONTESANO

Petitioner,

DONREY MEDIA GROUP d/b/a LAS VEGAS REVIEW JOURNAL AND SUE VOLEK

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD M. HECHT
1887 CATALPA TR.
LAS VEGAS, NEVADA 89108

Counsel for the Petitioner

March 9, 1984

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

I

QUESTION PRESENTED

Whether Ronald Kent Montesano, who at the age of 17 was a passenger in an automobile that struck and killed a police officer in 1955, has as a matter of law forever lost his right to privacy, a constitutionally protected federal right, so as to give free license to Respondent, Donrey Media Group, to print his name in connection with the incident in an historical article appearing in Respondent's newspaper of general circulation, the Las Vegas Review Journal, on February 24, 1978.

Whether the law has been so altered by this Court's decision in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975) as to permit such publication so long as the information is contained in some public record, no matter how obscure, and even when the article is historical in nature with no news value attached thereto.

PARTIES BELOW

Appellant in the Supreme Court, State of Nevada was the Petitioner, Ronald Kent Montesano. Respondents in the Supreme Court, State of Nevada, were the Respondents herein, Donrey Media Group d/b/a Las Vegas Review Journal and Sue Volek.

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No. 84-_____

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RONALD KENT MONTESANO

Petitioner,

DONREY MEDIA GROUP d/b/a LAS VEGAS REVIEW JOURNAL AND SUE VOLEK

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

NO. 84-_____

Ronald Kent Montesano, petitions for a Writ of Certiorari to review the judgement of the Supreme Court, State of Nevada in this case.

OPINIONS BELOW

The Order dismissing Petitioner's Complaint filed in the Eighth Judicial District Court, State of Nevada, dated September 10, 1979, is set forth in Appendix A. The Opinion of the Supreme Court, State of Nevada, filed September 6, 1983 is set forth in Appendix B. The order denying rehearing, filed December 12, 1983, is set forth in Appendix C.

JURISDICTION

The judgement of the Supreme Court, State of Nevada was filed September 6, 1983 and the Order denying the Petition for Rehearing was filed December 12, 1983. This Petition is filed within ninety days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This case arises out of a newspaper article published on February 24, 1978. The article in question purported to be an historical account of police officers who lost their lives in the line of duty, and was written after a police officer was shot and killed during a traffic stop. The story proceeded to recount an incident which occurred in 1955, when the Petitioner, Ronald Kent Montesano was seventeen years of age, and was a passenger in an automobile that struck and killed a police officer. The article printed the full name of the Petitioner, and also referred to a 1957 incident concerning the petitioner, whereby he was arrested for possession of marijuana.

Since the incident of 1957, Petitioner has had no criminal involvement except for minor traffic infractions, the last of which occurred in 1962. The Petitioner has lived a private existence since the incident of 1957, has never sought public office or become a public figure, and has been a completely rehabilitated and law abiding member of his community since his juvenile involvements as related herin.

The Petitioner filed his Complaint in the Eighth Judicial District Court, State of Nevada on April 19, 1979, essentially alleging claims for Relief based upon invasion of privacy. Respondents, Donrey Media Group and Sue Volek moved for dismissal, and on September 10, 1979, the District Court granted the motion dismissing the complaint, stating therein that under the facts as alleged and recited herein:

> "...that no publication of 'private facts' occurred giving rise to a cause of action for invasion of right to privacy, nor could such a cause of action be alleged...."
> (Appendix A)

An appeal was taken to the Supreme Court, State of Nevada. On September 6, 1983, in a three to two decision, the Court filed its opinion, affirming the Order of the District Court, and holding, in essence, that the mention of the juvenile offense in a parole and probation report concerning the 1957 offense made it a public record, thereby depriving the Petitioner of his right to privacy. (Appendix B).

REASONS FOR GRANTING THE WRIT

The decision of the Nevada Supreme Court, if permitted to stand, will result in the destruction of a constitutionally protected federal right. In dealing with two important, and often conflicting, constitutional guarantees, *i.e.*, the right of newspapers to disseminate the news as guaranteed by the constitutionally protected freedom of the press, and the individual's constitutionally protected right to privacy, the Courts have established certain guidelines which, when properly applied, afford the best protection possible for both. In its decision in the case at bar, the Nevada Supreme Court has disregarded the guidelines established by previous Federal Court decisions, and created a conflict in the law which can only be resolved in this Honorable Court.

The Petitioner recognizes that the right to publish is an important constitutional right which must be protected by the Courts. However, it is also clear that the right to privacy is also of constitutional dimension which is governed and protected by federal law. *Virgil v. Time, Inc.*, 527 F.2d 1122 (CA 9th Cir. 1975).

The gravamen of the tort of invasion of privacy consists of 1) an intrusion upon a persons' seclusion or solitude, or into his private affairs; 2) a public disclosure of embarrassing private facts about a person; 3) publicity which places a person in a false light in the public eye; and 4) appropriation for the tortfeasors' advantage, of a persons' name or likeness. *Virgil v. Time, Inc., Supra*, at page 1125.

Prior to the decision in the instant case, the body of case law dealing with invasion of privacy recognized the existence of the right to privacy and the need to protect that right, and established, essentially, two types of situations where the right to privacy was

outweighed by the right of freedom to publish what would otherwise be a private fact. Those situations involve the publication of private facts where they are newsworthy, *i.e.*, events which are currently happening and have a current interest to the public, as exemplified in *Cox Broadcasting Co. v. Cvan*, 420 U.S. 469, 95 S. Ct. 1029 (1975) and *Howard v. Des Moines Register and Tribune Co.*, 283 N.W. 2d 289 (Iowa 1979), and those cases in which the essentially private facts which were revealed involved a person who was a public figure or a public official. *Street v. National Broadcasting Co.*, 645 F.2d 1227 (CA 6th Cir. 1981); Rawlings v. Hutchinson Publishing Company, 543 P.2d 988 (Kan. 1975).

In situations where the events recited were no longer newsworthy, and were essentially historical in nature, and did not involve persons who were public figures or public officials, the Courts have uniformly afforded relief. *Virgil v. Time, Inc., supra; Briscoe v. Readers Digest Association.*, 93 Cal Rptr. 866, 483 P.2d 34(1971); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

There can be no question as to the Petitioner being a private person, *i.e.*, he was neither a public official nor a public figure. In *Wolston v. Readers Digest Association, Inc.*, 99 S. Ct. 2701 (1979), this Court clearly defined the meaning of a public figure. The fact that Petitioner led a private existence prior to his involuntary involvement in the events of 1955 and 1957, and returned to that private existence after such events and remained so for more than twenty years is not disputed. There can be no question as to his status as a private person at the time of the writing of the article.

Further, the article itself classified it as an historical account of prior occurrences, bearing no relationship as to the type of event, manner in which it occurred or the persons involved to the current happening other than the victims being police officers. It is important to note at this point, that even if it is felt that a factual dispute exists as to the newsworthiness of the article, the case was dismissed without a trial or hearing of any sort.

The Nevada Supreme Court has, by its decision, thrown an aura of confusion into the law affecting the right of privacy which mandates clarification. As previously mentioned herein, the Court, in large measure, based its opinion on the facts being contained in a "public record," to wit: a parole and probation report prepared in

1957. This is notwithstanding a Nevada Statute, which became effective in 1959, which classified such reports as being confidential, and also notwithstanding the fact that the damaging material concerned juvenile matters which were clearly confidential.

In ruling as it did, the Nevada Supreme Court completely overlooked a key essential element of the tort of invasion of privacy. It is the dissemination of these facts in a newspaper of general circulation that causes the harm. *Virgil v. Time, Inc., supra,* at 1126. The *Virgil* Court further stated that the manner in which the information is obtained is not determinative of this particular tort, but the publicizing of that which is private in character. *Supra,* at 1126.

Clearly, what the *Virgil* Court recognized, and what the Nevada Supreme Court completely ignores is the vast difference between the information being buried in some obscure Court record of a 1957 case, virtually impossible to find, and the printing of that information in a newspaper with the largest circulation in the State of Nevada.

If the decision of the Nevada Supreme Court is permitted to stand, and the decision followed, as it must be in this jurisdiction, it would mean that anyone committing an offense which results in a judicial proceeding, would forever be subject to having that offense publicized and widely disseminated, no matter how long afterward, no matter how well the individual has rehabilitated himself after the events have ceased to be newsworthy, and on the mere fact that a similar offense, committed many years later, had occurred. Not only has such a situation been upheld by the Nevada Supreme Court, it has decided that a person so injured does not, as a matter of law, have a right to pursue a legal remedy. It is respectfully urged that to allow this decision to stand would be intolerable. As succintly stated by the 9th Circuit Court of Appeals.

> "To test the validity of such a rule, we might start with the public's right to know under the First Amendment. Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellow men? In our view it does not. In our view, fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable."

Virgil v. Time, Inc., supra, at 1128.

It is respectfully suggested that this Court's decision in *Cox Broadcasting Corporation v. Cohn, supra,* was relied upon heavily for the decision of the Nevada Supreme Court.

The factual situation in *Cox* dealt with a current rape prosecution, clearly a newsworthy event. However, in the decision, this Court did not limit the effect its ruling to the publication of newsworthy events. By its language, the decision could be read to include articles which are historical in nature, and could be read to alter the protection that Courts have previously provided. For example, the Kansas Supreme Court, in *Rawlins v. Hutchinson Publishing Company,* 543 P.2d 988, 995, stated:

> "Cox, as we read it, would surely dictate a different result in both Melvin and Briscoe."

The precise question of the publication of facts concerning a private individual in an article which was not newsworthy was not presented to this Court in *Cox.* It is clear, however, that this question must be dealt with, especially if this Court did not intend to abrogate the protection which had previously been afforded.

CONCLUSION

In rendering its decision, the Nevada Supreme Court has decided an important question concerning a federally protected right contrary to applicable federal law and has created an area of confusion as to acceptable standards and safeguards to the privacy of individuals which has not been, but should be settled by this Court. Since, in large measure, this decision is based upon *Cox Broadcasting Corporation v. Cohn, supra,* it is respectfully urged that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

Harold M. Hecht
1887 Catalpa Tr.
Las Vegas, Nevada 89108
Counsel for the petitioner

APPENDIX A

A-1

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

RONALD KENT MONTESANO

Plantiff,

vs.

DONREY MEDIA GROUP, d/b/a LAS VEGAS REVIEW JOURNAL, SUE VOLEK, and DOES I through V,

Defendants.

JUDGEMENT AND ORDER OF DISMISSAL WITH PREJUDICE

The above-entitled matter coming on for hearing before the above-entitled Court on the 26th day of July, 1979, on the motion of Defendants, DONREY MEDIA GROUP, d/b/a L.\S VEGAS REVIEW JOURNAL and SUE VOLEK, pursuant to Rule 12(b)(6) N.R.C.P. to Dismiss said action for failure to state a claim upon which relief can be granted, the Plantiff appearing by and through his counsel, HAROLD HECHT, Esq., of COCHRANE, LEHMAN, NELSON & ROSE, and Defendants appearing by and through their counsel, GEORGE M. DICKERSON, Esq., of DICKERSON, MILES & PICO, and the Court having reviewed and considered the Memorandum of Points and Authorities in support of and in opposition to said motion, and the Court having heard argument of respective counsel in support of the respective contentions of each, and the Court having taken the matter under advisement and after due consideration being satisfied in the premises that no publication of "private facts" occurred giving rise to a cause of action for invasion of right to privacy, nor could such a cause of action be alleged, and being fully advised in the premises said motion to dismiss is allowed and good cause appearing therefor:

IT IS ORDERED, ADJUDGED AND DECREED that the Complaint on file in the above-captioned proceedings, and each and every cause of action therein alleged be and the same is hereby dismissed with prejudice, each party to bear his own costs.

DATED and DONE in Open Court this 10th day of September, 1979.

/s/ THOMAS J. O'DONNELL
District Judge

APPENDIX B

Supreme Court
of the State of Nevada
FILED
Sept. 6, 1983
Judith Fountain,
Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

RONALD KENT MONTESANO

Appellant,

vs.

DONREY MEDIA GROUP,
d/b/a LAS VEGAS
REVIEW JOURNAL and
SUE VOLEK,

Respondents.

Appeal from Order of Dismissal With Prejudice. Eighth Judicial District Court, Clark County; Thomas J. O'Donnell, Judge.

Affirmed.

Lehman and Nelson and Harold
M. Hecht, Las Vegas,
for Appellant.

Dickerson, Miles & Pico,
Las Vegas,
for Respondents.

OPINION

By the Court, MANOUKIAN, C. J.:[1]

This appeal concerns the claimed tortious public disclosure of private facts. Appellant contends that the actionable wrong resulted from the respondents' publication of his involvement in a hit-and-run accident twenty years earlier in which a police officer was killed. Respondents argue that because the news article was drawn from public records and because appellant's misdeeds were directly related to a subject of current public interest, the hit-and-run accident which occurred twenty years earlier was "newsworthy" at the time of publication. Being persuaded that "the interests of privacy fade when the information involved already appears on the public record" and that appellant's conviction for hit-and-run was intimately connected to the subject matter of the news story, we conclude that no actionable tort resulted from respondents' publication. Accordingly, we affirm the lower court's order dismissing the complaint with prejudice.

The seed of this dispute was sown in April 1955, when a Las Vegas police officer, who was responding to an emergency call, was killed in a collision. Appellant, Ronald Kent Montesano, was a passenger in the car which collided with the officer's motorcycle. Both appellant and the driver of the car in which he was riding fled the scene of the accident. At that time, appellant was seventeen years old. He was adjudicated as a juvenile delinquent and spent several weeks in the State Industrial School at Elko.

Appellant's criminal history did not end with the hit-and-run conviction. When appellant was nineteen, his Las Vegas apartment was the target of a narcotics raid. As a result of the raid, he was charged with and convicted for felony possession of marijuana. Appellant was sentenced as an adult offender to two years at the Nevada State Prison.

On February 24, 1978, the respondents printed a story describing the recent murder of a policeman. The newspaper article also recounted the history of Las Vegas law enforcement officers who had lost their lives in the line of duty. The specifics of appellant's hit-and-run conviction were detailed, as well as his conviction for

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[1]The Honorable David Zenoff, Senior Justice, was designated to sit in this case in the place of the Honorable Cameron Batjer. Nev. Const. art. 6, § 19; SCR 10.

possession of marijuana. Appellant was identified by name in the article.[2]

Appellant brought an action grounded on two claims for relief. First, he alleged a claim for public disclosure of private facts. Appellant contended that the twenty year span between the hit-and-run and the respondents' publication eroded any "newsworthiness" his misfortunes may have had because during that period he married, raised a family and became a law abiding citizen. Secondly, he alleged that the newspaper violated his statutory privilege of confidentiality provided by NRS 62.200(3) (now NRS 62.211(3)) because he was a juvenile when the collision occurred.[3]

Respondents moved to dismiss the complaint under NRCP 12 (b) (5) for failure to state a claim upon which relief can be granted. They noted that the relevant information of appellant's hit-and-run

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[2]The Las Vegas Review Journal article of February 24, 1978, under the byline of Sue Volek read in pertinent part:

> [In 1966] it had been more than 11 years since motorcycle policeman Sgt. Robert Dula was struck and killed by a car as he was rushing to an emergency call in April 1955.
>
> Records indicate that Marlin Bray, then 16, and Ronald Kent Montesano, then 17, allegedly had beaten a Nellis Airman at Fifth and Fremont Street. As Dula and another officer answered that emergency call, Dula was hit by the car driven by Bray. He never regained consciousness and died after reaching the hospital.
>
> Police records indicate the two juveniles ran from the accident scene, later bragging about the incident at a drive-in restaurant. The pair was arrested the following morning.
>
> Bray and Montesano were sent to the State Industrial School at Elko but were back home on parole a few weeks later. At that time, officials said the releases probably were made because the two had plans to leave the state.
>
> But exactly two years later, Montesano's Las Vegas apartment was the target of a narcotics raid. He pleaded guilty to charges of possession of marijuana and was sentenced to two years in prison.

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[3]In 1955, NRS 62.200(3) provided in relevant part that:

> [T]he name or race of any such child in connection with any proceedings under [the Juvenile Court Act shall not] be published in any newspaper without a written order of the court. 1943 N.C.L. § 1930.19.

In 1975, NRS 62.200(3) provided in relevant part that:

> [T]he name ... or the race of any such child in connection with any proceedings under [The Juvenile Court Act shall not] be published in or broadcasted or aired by any news medium without written order of the court. 1977 Nev. Stats. ch. 531 § 9, ch. 309 § 1.

conviction was contained in a parole and probation report prepared in 1955 to assist the court's sentencing decision on his possession conviction. Respondents alleged that the report was "a matter of public court record." Because appellant's misdeeds were of public record, respondents contended that he could not avail himself of the protections of NRS 62.211(3), nor could he maintain an action for public disclosure of *private* facts. Additionally, respondents argued that because appellant's hit-and-run conviction was relevant to an issue of contemporary public interest, mere passage of time did not erode the "newsworthiness" of appellant's criminal history.

The lower court ruled that the complaint failed to state a claim upon which relief can be granted because no publication of "private facts" occurred. The complaint was dismissed with prejudice. Appellant now challenges the lower court's ruling.

1. Standard of Review

On appeal, respondents argue that matters outside the pleadings were attached to their Rule 12(b) (5) motion which were not excluded by the court and that, pursuant to Rule 12(b)," the motion [was] treated as one for summary judgment and disposed of as provided in Rule 56..." *See also Cummings v. City of Las Vegas Mun. Corp.*, 88 Nev. 479, 499 P.2d 650 (1972); *Kellar v. Snowden*, 87 Nev. 488, 489 P.2d 90 (1971). Appellant seems to contend that because respondents did not submit any affidavits in support of their motion, the trial court did not treat it as one for summary judgment.

Respondents' motion was accompanied by the court records of appellant's offenses and by a copy of the news article. Appellate courts generally rely on two factors in determining whether a trial court rendered summary judgement rather than dismissed the cause for failure to state a claim. First, the reviewing court looks for indications that the lower court affirmatively excluded material outside the pleading. *Lodge 1380, Broth. of Ry., etc. v. Dennis*, 625 F.2d 819, 824 (9th Cir. 1980). In the instant case, the lower court relied on "matters outside the pleading" when arriving at its decision to dismiss appellant's claim for relief. The second factor is whether the reason for dismissal indicates that the district court did, in fact, consider matters outside the complaint. Lodge 1380, 625 F.2d at 825. Here, the trial court found that, as a matter of

law, no cause of action existed for invasion of privacy because the facts disclosed were not private facts. This ruling indicates that the trial judge transcended the bare allegations in the complaint and considered matters outside the pleadings. Therefore, the dismissal of appellant's action should be treated as a summary judgment.

Appellant, however, has conceded in his opposition to the motion to dismiss and on appeal that the relevant facts herein are undisputed. Thus, we can rule on this issue as purely a question of law.

2. The Public Record Ground.

This court has impliedly recognized an action for invasion of privacy in *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947). In the instant case, appellant has based his claim for relief on the fourth branch of the tort of invasion of privacy. The Second Restatement of the Law of Torts has named that branch the tort of "Publicity Given to Private Life." Restatement (Second) of Torts § 652D (1977). To maintain a cause of action for public disclosure of private facts one must prove that a public disclosure of private facts has occurred which would be offensive and objectionable to a reasonable person of ordinary sensibilities. *Forsher v. Bugliosi*, 608 P.2d 716, 725 (Cal. 1980); Restatement (Second) of Torts § 652D (1977). At issue in the present case is whether the publicity concerned the private, as distinguished from public life, of the appellant and whether the matter publicized is of a kind that is not of legitimate concern to the public. *See Howard v. Des Moines Register & Tribune Co..*, 283 N.W. 2d 289, 298 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980).

As noted in Comment b to Section 652D, "[t]here is no liability when the defendant merely gives further publicity to information about the plantiff that is already public." *Accord Howard*, 283 N.W.2d at 298; *Winegard v. Larsen*, 260 N.W.2d 816, 823 (Iowa 1977). *See Warren & Brandeis, The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). The courts have universally recognized that, for the purposes of the tort of invasion of privacy, materials properly contained in a court's official records are public facts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Melvin v. Reid*, 297 P. 91, 93 (Cal. App. 1931); *v. Courier Journal and Louisville Times Co.*, 402 S.W.2d 84, 88 (Ky. 1966); *Hubbard v. Journal Pub-lishing Co.*, 368 P.2d 147, 148 (N.M. 1962); *Schnabel v.*

Meredith, 107 A.2d 860, 862-863 (Pa. 1954). To resolve this issue, we must determine whether the information which the respondents printed in the Las Vegas Review Journal was properly contained in the court's official record. *See Howard*, 283 N.W.2d at 299.

Section 1038.19 of the 1943 NCL provides, in relevant part, that "the name or race of any such child in connection with any proceedings under [the Juvenile Court Act shall not] be published in any newspaper without a written order of the court." This statute or its substantial equivalent was in effect in 1955 when the accident occurred and in 1978 when the article was published. The records indicate that appellant was adjudicated as a juvenile delinquent. It follows that his conviction for "hit-and-run" should have never been published in a newspaper.[4] NRS 62.211(3). Nevertheless, some of the information concerning the 1955 accident found its way into a State Parole and Probation report which was prepared for the judge who sentenced appellant on the possession charge. This information was incorporated into official court records regarding a criminal charge for which appellant was tried as an adult. It is the publication of this information which prompted this litigation.[5]

Although NRS 62.211(3) and its predecessors plainly state that the name of a child shall not be published in any news medium in connection with a juvenile court proceeding, for the purpose of this

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[4]Respondents contend that because a juvenile court loses jurisdiction over an individual who is 21 years old, publication of juvenile court proceedings once the defendant is older than 21, does not violate NRS 62.211(3) or its predecessors. Given the protective goals of NRS 62.211(3), which seek to encourage rehabilitation of the youthful offender, such a construction is wholly without merit.

[5]Appellant's complaint did not allege NRS 213.1098 as a separate statutory claim to a privilege of confidentiality. Nevertheless, in an overabundance of caution, respondents addressed in their motion to dismiss the applicability of that statute which provides that any information obtained in the discharge of an official duty by a parole and probation officer or employee of the board shall be privileged. Appellant's Opening Brief contends that because respondents' news article was based on information obtained in the discharge of an official duty by a parole and probation officer or employee, the respondents violated his statutory privilege of confidentiality. Arguments raised for the first time on appeal need not be considered. *Williams v. Zell Hoofer*, 82 Nev. 579, 517 P.2d 789 (1973). Additionally, NRS 213.1098 was enacted in 1959, two years after the parole and probation report was prepared. 1959 Nev. Stats. ch. 461, § 17. The Legislature did not expressly provide that the statute was to be given retrospective effect. The general presumption favors prospective application of statutes. *See Holloway v. Barrett*, 87 Nev. 385, 487 P.2d 501 (1971). Since the probation report was an unprotected public record in 1957, NRS 213.1098 does not now operate to make the probation report privileged.

appeal, the material published by the respondents should be considered "public facts." The tort of invasion of privacy by publication of private facts pits society's interest in a free press against an individual's right to privacy. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975). Here, the respondents drew their information from official court records of an adult offense which contained little or no evidence that the "hit-and-run" conviction could not be reported. Penalizing the respondents for relying on such public records would do little to protect an individual's right to privacy and would greatly hinder the media in its investigations. Because as a free society we have an enormous public interest in a vigorous and unfettered press, we are impelled to hold that the information contained in the court records of appellant's possession conviction was in the public domain.

3. Legitimate Concern to the Public.

Appellant argues that, even if the information surrounding the death of the police officer and appellant's conviction for possession of marijuana were public fact properly contained in court records, the lapse of 20 years between the "hit-and-run" conviction and the publication eroded the public nature of those facts. Specifically, appellant contends that because he has returned to the private, lawful and unexciting life led by the great bulk of the community, the facts and circumstances surrounding his crimes and his identity are no longer matters of legitimate public concern.

Comment h of Section 652D provides that:

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure. Some

> reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.

Passage of time, of course, is a relevant factor, with other facts, in determining whether the publicity involves a matter of legitimate public concern. Restatement (Second) of Torts § 652D Comment k (1977).

In Howard, *supra,* the Iowa Supreme Court ruled on an article which concerned the involuntary sterilization of the plaintiff while a resident of a county home. The article was drawn from records accessible under Iowa's Freedom of Information Act. Although it was printed in the defendant's newspaper five years after the sterilization occurred, the publication was held not actionable. The *Howard* court determined that although the defendant identified the plaintiff by her maiden name in the article, the disclosure of the plaintiff's sterilization and her identity were matters of legitimate public concern, *i.e.,* they were "newsworthy." The article was published in response to the revocation of the county home's license by the State Health Department for poor care and lax administration. *Howard,* 283 N.W.2d at 292. the Iowa court found that the plaintiff's involuntary sterilization at the age of 18 was one of the better documented examples of abuse which led to the revocation. The addition of the plaintiff's identity to the article personalized the report of administrative excesses and lent specificity and credibility to the article. Additionally, at the time of the publication, the subject of involuntary sterilizations in public institutions was one of grave public interest. *Id.* at 303. Thus, the Iowa Supreme Court held that "[a] reasonable person could not find the disclosure in [*Howard*] was not of legitimate public concern under the *Restatement* standard applied in light of the First and Fourteenth Amendments." *Id.* at 304.

In *Barbieri v. News-Journal Co.,* 189 A.2d 773 (Dela. 1973), the Delaware Supreme Court found that the defendant's publication of the plaintiff's misfortune to be "[t]he last person to feel the lash [at the New Castle Correctional Institution in June, 1952] under Delaware's whipping post...", *id.* at 773-774, was not an actionable wrong. Although the plaintiff was identified by name and had, during the nine years between the whipping and the publication returned to "a blameless life as a good workman and a good

family man," the *Barbieri* court held that the incident was still of legitimate public concern. *Id.* at 775. At the time of the publication, the subject matter of the article—the use of corporal punishment to deter crime—was of acute public interest because a state senator had introduced a bill which would have made whipping mandatory punishment for certain crimes. *Id.* at 773, 775. The plaintiff's experience had a real bearing on the public issue, even though the court questioned the defendant's judgment in identifying the plaintiff and not crediting him with his rehabilitation. Nevertheless, the Delaware court rejected the plaintiff's argument, which was premised on *Melvin v. Reid*, 297 P. 91 (Cal. App. 1931), that the use of his name was unjustified. The standard enunciated in *Melvin*, "that the use of plaintiff's true name was unnecessary and indelicate and a willful and wanton disregard of that charity which should activate us in our social intercourse," *Barbieri*, 189 A.2d at 776, *citing*, *Melvin v. Reid*, 297 P. 91, 93 (Cal. App. 1931), was too subjective a standard to impose on a free press.[6] Thus, in *Barbieri*, the publication of the plaintiff's whipping was held to be a newsworthy event and was not actionable. *Barbieri*, 189 A.2d at 777. *See also Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (N.M. 1962); *Smith v. Doss*, 37 So.2d 118 (Ala. 1948).

The United States Supreme Court, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), overturned on First Amendment grounds a Georgia statute making it a misdemeanor to publish or broadcast the name or identity of a rape victim and held that the defendant's publication of the rape victim's name could not support an action for invasion of privacy.[7] In *Cox Broadcasting*, the Supreme Court noted that, more than any other branch of the tort

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[6] *Melvin v. Reid*, 297 P.91 (Cal. App. 1931), concerned a suit for invasion of privacy brought by a former prostitute who had been tried for murder and acquitted. After the trial, she married and lived an exemplary and honorable life. Seven years later, the defendants distributed a film based on the plaintiff's life story which identified her by her maiden name. The California court held that because the incidents of plaintiff's trial appeared in the official records of the court the facts surrounding the trial were public and could not support an action for invasion of privacy. *Id.* at 93. Nevertheless, the court held that the use of the plaintiff's true name coupled with these facts "was not justified by any standard of morals or ethics" and was a direct invasion of her privacy. *Id.* Aside from the criticism of the nebulous standard employed by the *Melvin* court, the *Melvin* decision is readily distinguishable on its facts. In *Melvin*, the publication was unrelated to any current issue and made in a medium suggestive of entertainment. *See Howard*, 283 N.W.2d at 302.

[7] Respondents have not challenged the constitutionality of NRS 62.211(3).

of invasion of privacy, the tort of public disclosure of private facts directly confronts the constitutional freedoms of speech and press. This confrontation occurs "[b]ecause the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual...." *Cox Broadcasting*, 420 U.S. at 489. In recognition that the defendants obtained the victim's name from court records, the Supreme Court stated that "even the prevailing law of invasion of privacy generally recognizes that the interests of privacy fade when the information involved already appears on the public record. The conclusion is *compelling* when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a free press." *Id.* at 494-495. (Emphasis added.) Following the *Cox Broadcasting* decision, the Kansas Supreme Court rejected the test of "current newsworthiness" which required a case by case evaluation of the current public interest where the facts published are public facts concerning a present or former public official. The Kansas court reasoned that "[s]uch a test would impose an intolerable burden on the press to publish at the peril of having its news judgment later declared faulty in an action for damages." *Rawlins v. Hutchinson Publishing Co.*, 543 P.2d 988, 996 (Kan. 1975).[8]

The balancing process inherent in the *Restatement* test is more responsive to the conflicting interests of a free press and an individual's right to privacy than the absolute position adopted by the Kansas Supreme Court. Nevertheless, in light of the Supreme Court's holding in *Cox Broadcasting* and the fact that the purpose of this tort is to protect an individual against unwarranted publication of *private* facts, the balance should be weighted in favor of free speech when the publication involves public facts which have been spread upon a public record.[9] The case relied on by the appellant, *Briscoe v. Reader's Digest Association*, 483 P.2d 34,57 ALR 3d 1 (Cal. 1971), was issued before the Supreme Court's

[8] Although *Cox Broadcasting* concerned a publication of a public fact contemporaneously with the rape trial, "[t]here can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and thus the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest." Prosser, *Privacy*, 48 Cal.L.Rev. 383, 418 (1960), *quoted with approval in, Werner v. Times-Mirror Co.*, 14 Cal.Rptr. 208, 212 (Cal.App. 1961).

opinion in *Cox Broadcasting*. In *Briscoe*, the California court added the weight of the state's interest in the integrity of the rehabilitative process along with an individual's interest in privacy to tip the balance in favor of prohibiting the identification of a reformed criminal. *Briscoe*, 483 P.2d at 40. Although California's interest in the rehabilitation and reformation of the criminal is strong, it is no greater than Georgia's interest in protecting rape victims from untoward publicity and encouraging reporting and prosecution of rapes which the Supreme Court held in *Cox Broadcasting* was overshadowed by the First Amendment.

In the instant case, the disclosure of appellant's conviction for "hit-and-run" was closely related to the subject matter of the story. It documented the many daily hazards which police officers face in the line of duty. The killing of police officers is a subject of grave public interest and, unfortunately, was an item of current public concern because of the recent murder of a police officer. The history of police fatalities in the City of Las Vegas was of equal legitimate public interest. While serving an appropriate news function, the disclosure of the appellant's identity contributed constructively to the impact of the article. It lent specificity and credibility to the report and strengthened the accuracy of the public perception of the gravity of the problem. Because all the information disclosed was contained in public records, we hold that a reasonable person could not find that the disclosure in this case was not of legitimate public concern under the *Restatement* standard applied in the light of the First and Fourteenth Amendments. This is so even though the publication occurred 20 years after the incident reported therein. *See Howard*, 283 N.W.2d at 303-304. Therefore, the lower court's summary judgment and order dismissing appellant's complaint with prejudice is affirmed.

/s/ Manoukian, C. J.
/s/ Springer, J.
/s/ Mowbray, J.

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[9] In *Cox Broadcasting*, the Supreme Court stated its reluctance to "embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.*, 420 U.S. at 495-496.

GUNDERSON, J., dissenting:

Most respectfully, I must dissent.

The majority appear to understand that, pursuant to the balancing test articulated by the Restatement of Torts, the trier of fact—the jury, not this court—should normally decide whether referring to appellant by name constituted a tortious invasion of his right of privacy. Nonetheless, in this instance, the majority have elected to decide the issue as one of law, in favor of respondents Donrey Media Group and the Las Vegas Review-Journal.

In this case as in others, however, I believe we should apply the law as delineated in the Restatement, and should allow appellant to have his day in court.

/s/ Gunderson, J.

ZENOFF, Sr. J., dissenting:

The majority's espousal of the sacred rights of speech, press and religion is shared by everyone, and no one has a corner on America's devotion to those freedoms of the First Amendment, but since its inception, and longer, the courts have maintained boundaries beyond which some expressions become unlawful invasion of privacy.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997 (1974), cited in the majority opinion, said "there is no constitutional value in false statements of fact. Neither the intentional lie *nor the careless error* materially advance society's interests in 'uninhibited, robust and wide open' debate on public issues." (Emphasis added.)

Here, the news article centered on the killing of policemen in the line of duty, which in turn was sparked by the recent murder of a law officer. The policeman in our case was killed in a traffic accident. That Montesano was a passenger in the car which collided with the motorcycle officer speeding in answer to a call was coincidental. He was not chasing the car in which Montesano was riding; the death was not a criminal murder.

The majority opinion scarcely brushes the commitment of the state of Nevada that the state will help a youngster in his attempts to correct the error of his ways. Confidentiality by statute of juve-

nile offenses and probation reports are promises with a purpose, *i.e.*, to provide incentive that if a youngster or culprit will straighten out and clean up his life, the state will give the security that his past offenses will be behind him and not used as a cloud over him or his family forever.

Cox, cited by the majority, involves a case then in progress. Montesano's offense was over twenty years old, and by the time the article was written was old news. Usually, time erodes a public figure status. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701 (1979). The accident was old, was unrelated to the point of the news article and the identity of the appellant was irrelevant to the story. *Gertz, supra; Wolston, supra; Briscoe v. Reader's Digest Association Inc.*, 483 P.2d 34 (Cal. 1971). Major incidents may bring lasting notoriety to some criminals, but most criminal incidents are of public interest for a short while only, and then slip into obscurity. As to those, publication of an ex-offender's name serves no useful purpose.

Appellant should be permitted to present his case to a jury to decide: (a) his public figure status at the time of the publication of the article; (b) whether respondents acted in a reckless disregard for the harm that might ensue; and (c) to determine the extent of Montesano's damages, if any.

/s/ Zenoff, Sr. J.

APPENDIX C

C-1

Supreme Court
of the State of Nevada
FILED
Dec. 12, 1983
Jeanne C. Richards,
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD KENT MONTESANO, No. 12275

Appellant,

vs.

DONREY MEDIA GROUP, d/b/a LAS VEGAS REVIEW JOURNAL and SUE VOLEK,

Respondents.

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Manoukian, C. J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Gunderson, J.

/s/ Zenoff, Sr. J.[1]

cc: Hon. Thomas J. O'Donnell, District Judge
Lehman & Nelson
Dickerson, Miles & Pico
Loretta Bowman, Clerk

No. 83-1494

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RONALD KENT MONTESANO,

Petitioner,

—vs.—

DONREY MEDIA GROUP d/b/a LAS VEGAS REVIEW JOURNAL and SUE VOLEK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

RESPONDENTS' BRIEF IN OPPOSITION

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel of Record for Respondents

Of Counsel:

DEAN RINGEL
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
New York, New York

GEORGE O. KLEIER
Vice President and General Counsel
DONREY MEDIA GROUP

April 7, 1984

Questions Presented

1. May this Court review a decision of the Supreme Court of Nevada when the Nevada Court itself identified an adequate and independent state ground for decision and where the asserted federal constitutional right of privacy relied upon in this Court was not raised at the trial level or at any time prior to supplemental briefing in the Nevada Supreme Court and was not discussed by that Court in its opinion?

2. Did the Nevada Supreme Court err in holding that no claim for privacy could be asserted with respect to a newspaper's publication of an accurate statement of an individual's prior criminal convictions where such facts were available in "official court records" recognized by the Court to be "public records" under Nevada law?

Parties Below

The parties participating below were Ronald Kent Montesano, appellant, and Donrey Media Group d/b/a Las Vegas Review Journal and Sue Volek, respondents.*

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* As required by Supreme Court Rule 28.1, the Donrey Media Group advises the Court that its parent corporation is Donrey, Inc., a Nevada corporation. Donrey, Inc. has no subsidiaries or affiliates other than wholly-owned subsidiaries, except the following:

Overthrust Cablevision, Inc., a Wyoming corporation; Progress Publishing Company, a Texas corporation; and Sun Printing Company, an Arizona corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1494

RONALD KENT MONTESANO,

Petitioner,

—VS.—

DONREY MEDIA GROUP d/b/a LAS VEGAS REVIEW JOURNAL and SUE VOLEK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Nevada affirming the grant of judgment to the defendants is reported at 99 Nev. (Advance Opinion No. 134), 668 P.2d 1081 (1983) and is annexed as Appendix B to the Petition ("Pet. at ____"); the denial of rehearing by the Nevada Supreme Court is annexed as Appendix C to the Petition. The opinion of the Eighth Judicial District Court, State of Nevada dismissing Petitioner's Complaint is unreported and is annexed to the Petition as Appendix A. ("Pet. App. A-____")

JURISDICTION

The Petition asserts that the jurisdiction of this Court is premised on 28 U.S.C. § 1254 (1982). (Pet. at 2) That section pertains to review of decisions of the federal courts of appeal and does not provide a basis for jurisdiction here. No adequate basis exists for the assertion of jurisdiction under any other section.

The decision below, as more fully discussed in Reasons for Not Granting the Writ, is premised on the adequate and independent state ground that no claim for privacy exists on the facts of this case under Nevada's law of privacy. One basic flaw in the privacy claim, the fact that the publication at issue concerns a matter of "public facts" not "private facts," is specifically denominated a "[g]round" of decision and is clearly based on state law principles. (668 P.2d at 1084) It is thus not subject to review by this Court. Although petitioner now also asserts a claim predicated on a federal "constitutional" right of privacy, no such claim was asserted in the complaint in this action, nor was such claim presented in the "Statement of Issues" filed by petitioner with the Nevada Supreme Court. That Court's opinion did not deal with any such claimed right. Thus the claimed federal "constitutional right of privacy" was not passed upon by the Nevada Supreme Court and under settled practice of this Court would not be considered upon any review. No issue of federal or constitutional law exists upon which jurisdiction may be premised.

STATEMENT OF THE CASE

This case arises from the February 24, 1978 publication in the Las Vegas *Review Journal* of an article written by respondent Sue Volek. The article described the recent murder of a Las Vegas police officer and then recounted the history of other Las Vegas law enforcement officers who had lost their lives in the line of duty. Among the incidents described was one

in 1955 in which a police officer, Robert Dula, was killed by a hit and run driver fleeing a crime scene. Plaintiff Montesano was identified in the article as an occupant of the car and his arrest and subsequent sentencing to the State Industrial School were recounted. Reference to "police records" was made in describing the sources of the information about Montesano who, at the time of the incident, was 17. The article described the subsequent history of the individuals involved in the deaths of the police officers and, in this connection, noted Montesano's subsequent arrest in connection with a police "narcotics raid." As the article reported, Montesano pled guilty to possession of marijuana and was sentenced to two years in the Nevada State Prison.

A complaint was filed on behalf of plaintiff on April 19, 1979 in the Eighth Judicial District Court of the State of Nevada. It alleged two purported causes of action. The first asserted that the newspaper story described above was actionable because it reported "private facts concerning the Plaintiff consisting of juvenile offenses allegedly committed more than twenty years previously. . . ." (¶ V)[1] The complaint itself acknowledged that plaintiff "was involved in juvenile offenses" (¶ VI) but it contended that plaintiff "thereafter has lived in a law abiding and respectable manner. . . ." (*Id.*) The complaint alleged that plaintiff had been injured by the publication and sought both compensatory and punitive damages.

The complaint also alleged that the publication in question violated Nev. Rev. Stat. § 62.200(3) (now Nev. Rev. Stat. § 62.211(3) (1983)) (Second Claim, ¶ II) which prohibits the publication of the name of a juvenile without written permission of the court.

No reference was made in the complaint to any purported federal constitutional right of privacy.

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1 In fact, as the Nevada Supreme Court ultimately held, plaintiff was sentenced as an adult with respect to the 1957 offense. (668 P.2d at 1085)

Respondents moved to dismiss the complaint on the ground that it failed to state a claim. They annexed to their moving papers various public records, including probation reports, reflecting the 1955 and 1957 arrests, adjudications and sentencing. The motion to dismiss was granted, the Nevada District Court concluding that no "publication of 'private facts' occurred" such as could give rise to a cause of action for invasion of rights of privacy. (Pet. App. A-1) No reference was made by the parties or the District Court to any asserted federal constitutional right of privacy.

On appeal, the Nevada Supreme Court affirmed the dismissal. The Nevada Supreme Court expressly held that the court below considered the public record material available to it and that the motion was treated as one for summary judgment.

The Nevada Supreme Court noted that it had previously impliedly accepted the existence of an action for invasion of privacy under Nevada law and stated that the claim petitioner sought to make was one for "public disclosure of private facts." The Court described the elements required in the following terms:

> "To maintain a cause of action for public disclosure of private facts one must prove that a public disclosure of private facts has occurred which would be offensive and objectionable to a reasonable person of ordinary sensibilities." (668 P.2d at 1084)

It noted that two distinct questions were presented: [1] "whether the publicity concerned the private, as distinguished from public life, of the [petitioner] and [2] whether the matter publicized is of a kind that is not of legitimate concern to the public." (*Id.* at 1084-85) It decided each of these matters adversely to the petitioner. Two judges dissented.

The opinion did not discuss any claim that a federal constitutional right of privacy existed.

Rehearing was denied and the present petition for certiorari followed.

REASONS FOR DENYING THE WRIT

I.

The Decision of the Nevada Supreme Court Is Based on Independent State Grounds and No Federal or Constitutional Question Is Presented for Review.

The petition purports to raise as its first question the propriety of denying petitioner "a constitutionally protected federal right" of privacy. (Pet. at i) As demonstrated in Point II, *infra*, no such right exists with respect to a privately owned newspaper. But as a threshold jurisdictional matter, the reality is that no claim concerning such federal right was asserted in the complaint or in any proceedings before the trial court, nor was the matter identified as an issue on appeal or passed upon by the Nevada Supreme Court.[2] Under long-settled principles this Court will not entertain a claim under such circumstances.

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2 While appellant's initial briefs in the Nevada Supreme Court did refer to a constitutional right of privacy, those briefs are explicit that the argument was one based on Article 1, Section 1 of the Nevada Constitution and premised on an asserted analogy to California law. (Appellant's Opening Brief at 8-9) Petitioner stated in his initial briefing to the Nevada Supreme Court that "[t]he question before this honorable Court, therefore, is whether under the conceded facts as enumerated above the Appellant has stated a claim for relief under *the laws of the State of Nevada*." (Appellant's Reply Brief at 4 (emphasis added))

The first reference below to any federal constitutional right appears in a "Supplemental Points and Authorities" ("Supp. Br.") filed by petitioner after the close of briefing in the Nevada Supreme Court at the specific request of that Court to deal with several cases not previously briefed by any party. (Supp. Br. at 2) The *sole* authority cited by respondent for the proposition that a federal constitutional right exists was the Ninth Circuit's decision in *Virgil* v. *Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976), one of the cases as to which the Nevada Supreme Court sought briefing. But, the quotation relied upon from *Virgil* refers not to any constitutional right of privacy, but to a constitutional privilege *limiting* the privacy tort.

(footnote continued)

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

See also NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975) (even though raised in Court of Appeals, issue not considered by this Court because not raised in the District Court).

The decision of the Nevada Supreme Court did, of course, deal with federal constitutional principles—the First Amendment principles which limit the scope of any permissible privacy claim. Most notable among the decisions on this subject relied upon below is this Court's ruling in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). But the constitutional principles set forth in *Cox* and discussed at length in part 3 of the Court's opinion did not provide the sole basis for decision.

The decision of the Nevada Supreme Court finding that petitioner had no claim for invasion of privacy rested on two distinct and independent grounds: 1) that the article in question involved public, not "private facts" and 2) that the article dealt with a matter of "legitimate public concern." Either of these grounds provides a sufficient basis for finding that a claim has not been asserted under Section 652(D) of the Restatement (Second) of *Torts* (1977), upon which the Court relied for its definition of the underlying tort.

(527 F.2d at 1129) The Nevada Supreme Court did not discuss any federal constitutional right of privacy.

The Nevada Supreme Court was free to reject any legal claim not raised below, let alone one not even raised in the initial briefing on appeal. (See its opinion, 668 P.2d at 1085 n.5, and case cited therein.) And as this Court has noted " 'when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Fuller* v. *Oregon*, 417 U.S. 40, 50 n.11 (1974). Here the circumstances make plain the correctness of that approach.

That section provides:

> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public."[3]

That failure to satisfy *either* element of the tort provides a basis for dismissal was recognized by the Iowa Supreme Court in *Howard* v. *Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980), a case heavily relied upon by the Nevada Supreme Court.

The Nevada Supreme Court entitled one portion of its opinion "The Public Record Ground" and expressly held that "for the purposes of the tort of invasion of privacy, materials properly contained in a court's official records are public facts." (668 P.2d at 1084-85) The Court held that the references to both the 1955 and 1957 criminal activities in the 1957 probation report were not subject to any statutory privilege of confidentiality and thus were "public facts." (668 P.2d at 1085-86) In ruling on this "public record ground" the Court relied upon the *Restatement* itself and a host of decisions from other state courts dealing with the elements of the privacy tort, not constitutional principles. Strikingly, several of the decisions relied upon, including *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (Sup. Ct. 1962) (which also dealt with information concerning juvenile offenders) were decided long before this Court's constitutional decision in *Cox Broadcasting*

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3 The Restatement "Comments," like the text of the Restatement, deal separately with the public/private facts dichotomy and the question of whether a matter is of legitimate public concern. (*Compare* comment (b) *with* comment (d).)

Corp. v. *Cohn*, *supra*, and thus could not have relied upon any constitutional principles set forth therein.[4]

Thus, the portion of the Nevada Supreme Court's decision denominated "the public record ground" constitutes a "plain statement" of an "adequate" and "independent" state ground of decision. *Michigan* v. *Long*, 103 S. Ct. 3469 (1983).

This Court has made clear it will not review a state court judgment based upon such an adequate and independent state ground, since:

> "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

Accord, *Berea College* v. *Kentucky*, 211 U.S. 45 (1908); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

And where a decision, as here, rests on "two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, *supra*, 296 U.S. at 210. That is precisely the case here.

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4 Indeed, in *Cox* this Court recognized that "even the prevailing law of invasion of privacy generally requires that the interests in privacy fade when the information involved already appears on the public record." (420 U.S. at 494-95) Only after stating this view of the common law did this Court go on to its separate analysis of the constitutional issues. *Cox* was cited for precisely this proposition as to *common law* in part 2 of the Nevada Supreme Court's decision.

II.

The Decision Below Was Plainly Correct

The Petition asserts that a right of privacy exists here which is of "constitutional dimension . . . and [is] protected by federal law." (Pet. at 3) This proposition is plainly incorrect.

The only authority cited for the proposition is the Ninth Circuit's decision in *Virgil* v. *Time, Inc.*, *supra*. The portion of *Virgil* relied upon, however, plainly refers not to the privacy claim itself but to the *privilege* to report newsworthy matters as a matter of "constitutional dimension." (527 F.2d at 1128-29)[5]

Nor does other authority support the existence of the federal constitutional right asserted by Montesano.

This Court has rejected a claim that a federal constitutional right protecting against unwanted publicity existed in *Paul* v. *Davis*, 424 U.S. 693 (1976). In that case a citizen challenged a police official's distribution of his photograph as part of a list of "Active Shoplifters." The Court concluded that this distribution did not involve a deprivation of a constitutional right. The Court noted that while its "right of privacy cases" defied "categorical description" they generally related "to marriage, procreation, contraception, family relationships, and child rearing and education." (424 U.S. at 712-13) There, as here, the privacy interest bore no relationship to such matters.

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5 In his first reference to any such right, in a supplemental brief filed with the Nevada Supreme Court, petitioner quoted the passage in *Virgil* he relied upon:

> " ' . . . we are satisfied that this provision is one of constitutional dimension delimiting the scope of the tort and that the extent of the privilege thus is controlled by federal rather than state law.' " (Supp. Br. at 2)

The reference to the "provision" in this passage was to the "privilege to publicize newsworthy matters." (527 F.2d at 1128) This was omitted from petitioner's argument.

Even more fundamentally, federal constitutional privacy claims run against the government, not private citizens. As this Court stated in *Paul* v. *Davis*, *supra*, where constitutional privacy claims have been found "it has been held that there are limitations on the *States*' power to substantively regulate conduct." (424 U.S. at 713) (emphasis added) This Court has recognized that protection of privacy against non-governmental intrusion, the "right to be let alone by other people—is . . . left largely to the law of the individual States." *Katz* v. *United States*, 389 U.S. 347, 350-51 (1967) (footnotes omitted); *see also Reilly* v. *Leonard*, 459 F. Supp. 291, 299 (D. Conn. 1978); *Arrington* v. *New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319 (1982), *cert. denied*, 103 S. Ct. 787 (1983) (both rejecting claim of constitutional right of privacy against newspaper).

Thus no federal constitutional right of privacy can be asserted to challenge the holding below. Nor was the Court's reliance on *Cox Broadcasting Corp.* v. *Cohn*, *supra*, in error even if the constitutional principles announced in that case were viewed, contrary to the argument set forth in Point I, as the sole basis for the decision of the Nevada Supreme Court.

In *Cox* this Court was faced with a civil claim brought by the father of a deceased rape victim who asserted that his privacy had been invaded by the publication of his daughter's name in violation of a Georgia statute purporting to prohibit the publication of the name of a rape victim. This Court held that

> "a civil action against a television station for breach of privacy could not be maintained consistently with the First Amendment when the station had broadcast only information which was already in the public domain. 'At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official Court records.'" *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 840 (1978), quoting in part from *Cox*, *supra*, 420 U.S. at 496.

The Nevada Supreme Court has held by way of interpreting Nevada statutory law, that the information published here was drawn from the "public record." (668 P.2d at 1085-86 & n.5) The publication at issue thus fits squarely and explicitly within the controlling holding of *Cox* and may not provide the basis for a claim.

Petitioner asserts that the passage of time between the creation of the public record and publication somehow dilutes the applicability of *Cox*. But the holding in *Cox* is not so qualified and the courts of last resort which have considered this contention since *Cox* was decided have flatly rejected it. *See Howard* v. *Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); *Rawlins* v. *Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988 (1975).[6] This Court observed in *Cox* that

> "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public." 420 U.S. at 496.

This reasoning precludes the approach petitioner urges, for that approach would reintroduce the very uncertainty, the subjective assessment, and ultimately, the timidity about the reporting of public record material, that this Court sought to avoid. Assessments of whether "too much" time had passed or a weighing of the passage of time against a subjective assess-

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6 In so doing, these cases rejected the pre-*Cox* decision of the California Supreme Court in *Briscoe* v. *Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) relied upon by petitioner.

ment of newsworthiness invites the very evil *Cox* sought to avoid.[7]

The conclusion of *Cox* is plain:

> "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." 420 U.S. at 496.

The decision below, holding that no claim existed for the reporting of accurate information disclosed in public court records, is correct.

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7 Indeed the subjective judicial process involved in weighing the impact of the passage of time against the "newsworthiness" or "public interest" inherent in the reporting of public record material poses one of the problems which led this Court to reject the "public or general interest" standard in the defamation context in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974). There this Court held it to be unseemly for the judicial system to determine what material is "relevant to self-government." That is precisely the obligation the petitioner would impose on the judicial system here.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel of Record
for Respondents

Of Counsel:

DEAN RINGEL
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
New York, New York

GEORGE O. KLEIER
Vice President and
General Counsel
DONREY MEDIA GROUP